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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM 1993

ALPHONSE FLETCHER, JR.,

Petitioner,

-v.-

KIDDER, PEABODY & COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's decision in *Gilmer v. Interstate/Johnson Lane* requires that a plaintiff pursue a claim of race discrimination in employment in an arbitral forum, under procedures established by the New York Stock Exchange, pursuant to an arbitration clause contained in an application for securities industry registration he executed at the commencement of his employment.

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KIDDER, PEABODY & COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of New York entered in this proceeding on July 9, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals, to be reported at ___ N.Y.2d ___, ___ N.E.2d ___, 1993 WL 246186 (1993), appears at Appendix A. The Court of Appeals' order granting leave to appeal, reported at 81 N.Y.2d 702, 610 N.E.2d 389, 594 N.Y.S.2d 761 (Jan. 7, 1993) (Table), appears at Appendix B.

The opinion of the Supreme Court of the State of New York, Appellate Division, First Department, dated June 18, 1992, reported

at 184 A.D.2d 359, 584 N.Y.S.2d 838 (1st Dept. 1992), appears at Appendix C.

The memorandum opinion of the Supreme Court of the State of New York, New York County, dated November 22, 1991, is not reported. It appears at Appendix D.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals, requiring Petitioner to pursue his claim of race discrimination in employment in an arbitral forum, was rendered on July 9, 1993. (App. A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

HOW THE FEDERAL QUESTION WAS PRESENTED

Before the trial court, the Supreme Court of the State of New York, New York County, the Respondent unsuccessfully moved to compel arbitration on the ground that the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (the "FAA"),[1] as applied by this Court's decision

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[1] Section 2 of the FAA provides, in pertinent part:

"A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . shall be valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Section 3 of the FAA provides:

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement,

in *Gilmer v. Interstate/Johnson Lane*, ___ U.S. ___, 111 S. Ct. 1647 (1991), required Petitioner to arbitrate his claims of race discrimination. (App. D at A36). The issue of arbitrability was raised before the intermediate state appellate court and ultimately, before the Court of Appeals, both of which found in Respondent's favor after considering and rejecting Petitioner's argument that the Federal Arbitration Act did not require the arbitration of statutory *race* discrimination claims.

STATEMENT OF THE CASE

Background

The central issue in this action is whether petitioner Alphonse Fletcher, Jr. ("Fletcher") is entitled to a judicial forum for his claim of race discrimination in employment brought against Respondent Kidder, Peabody & Co. ("Kidder") under New York's Human Rights Law (N.Y. Exec. L. § 290 *et seq.* (McKinney 1982 & Supp. 1993)), or whether Fletcher may be confined to an arbitral forum, sponsored and controlled by the industry in which Kidder is a member, based upon this Court's precedent and the FAA. The New York Court of Appeals concluded that Fletcher's claim must be arbitrated.

1. Fletcher's Employment with Kidder

Fletcher is a 27-year-old black male who, from his graduation from Harvard College in 1987 until November 1989, was employed as an equity arbitrage specialist by the brokerage firm of Bear Stearns & Co., Inc. In November 1989, Fletcher left Bear Stearns to join Kidder's equity trading department on terms negotiated with

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providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3.

a managing director of Kidder. The managing director agreed with Fletcher that Kidder would pay him total annual compensation of no less than 20%, and up to 25%, of his trading profits at the firm, and that all his 1990 bonus payments would be made no later than early 1991. On joining Kidder, Fletcher became the only black person among the equity trading department's 200 professionals.

Upon the commencement of, and as a condition of, his employment with Kidder, Fletcher executed a Uniform Application for Securities Industry Registration or Transfer, which is commonly known as a "Form U-4", and registered with the New York Stock Exchange. Paragraph 5 of the standard Form U-4 contains the employee's agreement to arbitrate any dispute with his employer that the exchanges with which he is registering require him to arbitrate. New York Stock Exchange Rule 347, 2 N.Y.S.E. Guide (CCH) ¶ 2347, at 3596 (1992), requires representatives registered with the Exchange to arbitrate all controversies with their employers that arise out of their employment or termination.

During 1990, Fletcher was the leading producer in Kidder's equity trading department, generating net profits for the firm in excess of $25.5 million. Under his agreement with Kidder, those profits entitled him to between $5 million and $6.5 million in compensation for 1990. When it came time to pay, however, Kidder reneged on the terms of its agreement with Fletcher. Adopting a special deferral plan applicable only to Fletcher and his trading assistant, Kidder withheld 50% of Fletcher's bonus compensation and deferred payment for up to 18 months. It also sought to hold him personally responsible for all potential losses the firm might incur as a result of his trading, even though none of the other — white — professionals in the equity trading department were subject to similar liabilities. Kidder also proposed that one-third of the bonus compensation Fletcher had already earned be payable solely at the firm's discretion.

In February of 1991, Fletcher complained about Kidder's discriminatory treatment of him to the firm's head of human resources, the person ostensibly responsible for effectuating Kidder's equal employment opportunity policies. While the executive explicitly acknowledged in that conversation that Kidder — as well as the rest of the securities industry — was behind the times in racial equality, he also told Fletcher that he had no cause to complain, since he was "one of the highest paid black males" in corporate America. Because of Kidder's discriminatory breach of the terms of his employment agreement, Fletcher resigned on March 18, 1991.

2. Fletcher's Demand for Arbitration on His Contract Claim and His Initiation of this Race Discrimination Action

Recognizing that he was bound by the arbitration provision in his Form U-4 registration application with respect to *contractual* claims arising out of his employment agreement, on April 18, 1991, Fletcher served on Kidder a demand for arbitration of those claims.[2] Aware, however, that New York's highest court had held discrimination claims brought under the state's Human Rights Law to be a matter for the courts and not arbitration, and that non-arbitrable claims may be pursued independently of arbitrable claims, *see Matter of Wertheim & Co., Inc. v. Halpert*, 48 N.Y.2d 681, 397 N.E.2d 386, 421 N.Y.S.2d 876 (1979), *aff'g* 65 A.D.2d 724, 411 N.Y.S.2d 11 (1st Dept. 1978); *see also DeSapio v. Josephthal and Co., Inc.*, 143 Misc. 2d 611, 613, 616, 540 N.Y.S.2d 932, 934, 936 (Sup. Ct. N.Y. Co. 1989), Fletcher commenced the instant discrimination action against Kidder in the Supreme Court

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[2] The arbitration panel awarded Fletcher $1.3 million on his contract claims. *See Kidder Must Pay Trader $1.3 Million In Bonus Dispute*, Wall St. J., Dec. 15, 1991, at C21.

of the State of New York, New York County, on June 13, 1991. Fletcher's complaint alleged that he was discriminated against during his employment — and ultimately constructively discharged from Kidder's equity trading department — on the basis of his race, in violation of the New York State Human Rights Law. The complaint sought approximately $3.9 million in compensatory damages, and other relief.

The Proceedings Below

On September 6, 1991, Kidder moved the New York Supreme Court to stay the action and to compel Fletcher to arbitrate his race discrimination claim. The trial court denied that motion (App. D), and Kidder appealed to the Appellate Division, First Department, which reversed, after concluding that the FAA and the cases decided under that statute, specifically, this Court's decision in *Gilmer*, mandated enforcement of petitioner's agreement to arbitrate. (App. C).

On leave from the New York Court of Appeals, Fletcher appealed the Appellate Division's decision. He directed the court's attention to an interpretive memorandum of Representative Edwards and House Reports to the Civil Rights Act of 1991 to argue that Congress did not intend the FAA to preclude a state from providing a judicial forum for the hearing of race discrimination claims.

In an opinion dated July 9, 1993 (App. A), the Court of Appeals affirmed the Appellate Division's decision, reasoning that this Court's decision in *Gilmer* was dispositive of the issue and that, under the methodology mandated by this Court in *Gilmer* — a statute-specific inquiry into congressional intent to reserve certain statutory claims from the reach of the FAA — Fletcher's agreement to arbitrate must still be read to encompass his race discrimination claim and to preclude his access to a judicial forum. The court concluded:

> "Contrary to the *Fletcher* plaintiffs' contentions, there is nothing in the legislative history of either [Title VII of the Civil Rights Act of 1964] itself or the recently adopted amendments to that statute . . . that would suggest the existence of a congressional intent to override the general rule that anticipatory contracts to arbitrate are enforceable under the FAA."

___ N.Y.S.2d at ___, 1993 WL 246186 at *3; App. A at A7.

REASONS FOR GRANTING THE WRIT

The Court of Appeals decision — like those of other federal and state appellate courts that have taken up the question of whether race discrimination claims must be arbitrated — is based on too facile an application of *Gilmer*'s reasoning as to age discrimination claims to race discrimination claims.

The decision below gave inadequate weight to determinative legislative history of the Civil Rights Act of 1991 and substantial evidence that Congress — and, indeed, this Court — have consistently viewed discrimination based on race differently than other forms of discrimination, reserving to victims of this form of discrimination additional protections under the law. Further, the court failed to adequately consider the particular inappropriateness of abdicating judicial resolution of race discrimination claims in favor of industry-sponsored arbitration panels.

Here, the petitioner was employed in an industry reputed to be a white, male bastion; here the "entrance fee" for admission to the industry is compelled assent to a comprehensive arbitration clause; and here the arbitral forums forced upon petitioner are all industry run. To entrust to the securities industry the vital public interest of acting as the sentinel against race discrimination would be, in the words of former Chief Justice Burger, like making "the foxes guardians of the chickens." *Barrentine v. Arkansas-Best Freight*

System, Inc., 450 U.S. 728, 750 (1981) (Burger, C.J., and Rehnquist, J., dissenting).

For these reasons, as well as the need for clarity as to the impact this Court's earlier decision in *Gilmer* is to have on claims of race discrimination, we respectfully urge this Court to review the decision below.

I.

THE NEW YORK COURT OF APPEALS' DECISION WAS PREMISED ON AN INAPPROPRIATE AND FACILE EXTENSION OF *GILMER* TO RACE DISCRIMINATION CLAIMS

The FAA expresses a "liberal federal policy favoring arbitration," *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), and applies by its terms to "contract[s] evidencing a transaction involving commerce." 9 U.S.C. § 2. Because of the FAA's preemptive force, a state court is obliged to enforce arbitration agreements as to claims based on *state* law unless Congress has manifested an intention to preclude waiver of judicial remedies for analogous *federal* claims, and thus to exclude that particular class of claims from the reach of the FAA. *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

Indisputably, Title VII of the Civil Rights Act of 1964 is the federal statutory analogue to New York's Human Rights Law. Because this Court has not expressly considered whether a claim of race discrimination in employment brought under Title VII may be compelled to arbitration under the FAA, the courts below relied on this Court's decision in *Gilmer*, in which the Court was asked to decide whether a claimant under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (1990) (the "ADEA"), could be compelled to arbitrate an age discrimination claim pursuant to the arbitration clause in a Form U-4. Yet, although *Gilmer*

impacts upon the question put to the courts in this case, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), remains this Court's last examination of the arbitrability of Title VII claims, and cannot be wholly disregarded.

The ADEA claimant in *Gilmer* relied on this Court's earlier decision in *Alexander*, in which the Court unanimously held that an employee's statutory right to trial *de novo* under Title VII was not foreclosed because he had previously submitted his race discrimination claim to arbitration under an arbitration clause contained in a collective-bargaining agreement. As the *Alexander* Court explained:

> "we think it clear that there can be no prospective waiver of an employee's rights under Title VII. . . . Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver."

415 U.S. at 51-52. Noting that "the choice of forums inevitably affects the scope of the substantive right to be vindicated," 415 U.S. at 56 (quoting *U.S. Bulk Carriers v. Arguelles*, 400 U.S. 351, 359-60 (1971) (Harlan, J. concurring)), the *Alexander* Court held that Congress had given the "federal courts . . . plenary powers to secure compliance with" and "final responsibility for enforcement of Title VII." *Alexander*, 415 U.S. at 44, 45.

The *Gilmer* Court distinguished *Alexander* on the ground that the latter case was not concerned with an agreement to arbitrate statutory claims; that it involved a collective bargaining situation where the

claimant was represented by his union, with the potential for conflict that entailed; and that it was not decided under the FAA and thus did not implicate that act's liberal policy favoring arbitration. Nevertheless, nothing in *Gilmer* undermined, challenged, or called into doubt the premise upon which *Alexander* based its conclusion that the rights protected by Title VII deserved and required judicial enforcement. Simply put, *Gilmer* did not consider Title VII.

Concluding that *Alexander* "provide[s] no basis for refusing to enforce Gilmer's agreement to arbitrate his ADEA claim," 111 S. Ct. at 1656-57, the *Gilmer* Court held that the determination whether or not arbitration of a statutory claim may be compelled under a Form U-4 agreement hinges instead on a statute-specific investigation into congressional intent:

> "Although all statutory claims may not be appropriate for arbitration, '[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.' . . . If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute]'s underlying purposes."

Id. at 1652 (citations omitted). The *Gilmer* Court explicitly noted its willingness to seek an expression of congressional intent to preclude compulsory arbitration "even in [Congress's] recent amendments to the ADEA." *Id.* at 1653-54.

Gilmer itself does not require that race discrimination claims be forced into arbitration. Because *Gilmer* was decided under the ADEA and not under Title VII, the Court's conclusion in that case was a product of its analysis of the text and legislative history of the ADEA. The Court did not analyze Title VII, nor did it consider that statute's text or legislative history. Hence, the applicability of

Gilmer's reasoning and ultimate holding to claims brought under Title VII must depend on an examination of that particular statute, and not on a mechanical extension of its holding to race discrimination claims.[3]

As the *Gilmer* Court expressly recognized, "all statutory claims may not be appropriate for arbitration," 111 S. Ct. at 1651, reaffirming a principle the Court has consistently acknowledged even when extending the reach of the FAA to various types of federal statutory claims. *See e.g., Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 478 (1989) (claims under Securities Act of 1933 arbitrable); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987) (claims under Securities Exchange Act of 1934 and RICO arbitrable); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) (Sherman Act claims arbitrable). It is difficult to imagine what class of statutory right "may not be appropriate for arbitration" if not the right to be free from the most fundamental form of economic discrimination based on skin color.

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[3] While the plaintiff in *Gilmer* conceded that he was unable to direct the Court to evidence of legislative intent in the text or legislative history of the ADEA, *id.* at 1652, such an intent is evident in the legislative history to Title VII. *See infra* at II

— II.

IN THE 1991 AMENDMENTS TO TITLE VII, CONGRESS EVINCED ITS INTENTION TO PRECLUDE COMPULSORY ARBITRATION OF CLAIMS BROUGHT UNDER THAT TITLE

Unlike *Gilmer*'s ADEA plaintiff, Fletcher rests his argument on dispositive evidence of Congress's intent to withhold from compulsory arbitration race discrimination claims brought under Title VII. On November 7, 1991, Congress amended Title VII with the enactment of the Civil Rights Act of 1991 (Pub. L. 102-166, 105 Stat. 1071 (1991)), which was passed in part to respond to a number of recent decisions of this Court.[4] Included in the Civil Rights Act of 1991 was a new § 118, which embraced the use of alternative means of dispute resolution, including arbitration, "where appropriate and to the extent authorized by law."

On its face, § 118 in no way resolves the issue of whether arbitration of Title VII claims may be *compelled* under the terms of an anticipatory arbitration clause contained in a Form U-4. That question is instead answered in the legislative history of the Civil Rights Act of 1991.

On the date of the Act's passage, Representative Edwards of California, the House co-sponsor of the bill that ultimately became the Act — and the Chairman of the House Subcommittee on Civil and Constitutional Rights — presented the following analysis to the full House:

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[4] *See e.g.*, H.R. Rep. No. 102-40(I), 102nd Cong., 1st Sess. (1991), at 14 (*reprinted in* 1992 U.S.C.C.A.N. 552) ("[one] purpose[] of the [Civil Rights Act of 1991 is] . . . to respond to the Supreme Court's recent decisions by restoring federal civil protections against employment discrimination").

> "Section 118 encourages the use of alternative dispute resolution mechanisms, such as conciliation and mediation, to resolve disputes arising under Title VII when appropriate and to the extent authorized by law. This proviso is intended to supplement, not supplant, remedies provided by Title VII, and is not to be used to preclude rights and remedies that would otherwise be available. **This section is intended to be consistent with decisions such as *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), which protect employees from being required to agree in advance to arbitrate disputes under Title VII and to refrain from exercising their right to seek relief under Title VII itself. This section contemplates the use of voluntary arbitration to resolve specific disputes after they have arisen, not coercive attempts to force employees in advance to forego statutory rights.** No approval whatsoever is intended of the Supreme Court's recent decision in *Gil[mer] v. Interstate Johnson Lane Corp.*, 111 S. Ct. 1647 (1991), or any application of it to Title VII."

Interpretive Memorandum on the Civil Rights Act of 1991, 137 Cong. Rec. H9530 (daily ed. Nov. 7, 1991) (emphasis supplied).[5]

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[5] Representative Edwards' interpretive memorandum represents an authoritative guide to Congress's intent. Unlike passing partisan remarks in the course of floor debates, this interpretation constitutes precisely the sort of legislative history that is consistently accorded great weight. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982) (statement of sponsor, made on same day amendment was passed and prepared rather than spontaneous, is "authoritative guide to statute's construction"); *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 565 (1976) ("statement of one of the legislation's sponsors . . . deserves to be accorded substantial weight in interpreting the statute"); *Lieberman v. FTC*, 771 F.2d 32, 38-39 (2d Cir. 1985) (citing *North Haven*); *cf.*

This interpretation of § 118 accords with the view shared by the two House Committees that issued reports on the Act. In its report on the bill, the House Education and Labor Committee stated that:

> "The Committee emphasizes . . . that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, **the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII**. This view is consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner-Denver Co.* The Committee does not intend this section to be used to preclude rights and remedies that would otherwise be available."

H.R. Rep. No. 102-40(I), 102nd Cong., 1st Sess., at 97 (1991) (*reprinted in* 2 1991 U.S.C.C.A.N. 549, at 635) (emphasis supplied). Identical language appears in the Report of the House Judiciary

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Kuehner v. Heckler, 778 F.2d 152, 160 (3d Cir. 1985) (statement of one of bill's Senate managers given in presenting final bill to Senate "must be given great weight" in part because he was the chairman of the committee that had reported the bill).

At least one author has recognized that "[t]he legislative history behind the Civil Rights Act of 1991 casts further doubt on the ability to preclude jury trials, *ex ante*, with arbitration agreements." Daniels, *Employment Law Guide to The Americans With Disabilities Act* 12-7 (1992). Professor Daniels goes on to quote Edwards' interpretive memorandum, noting that it "expressly rejects *Gilmer*'s approach." *Id.* at 12-8 and 12-9.

Committee. H.R. Rep. No. 102-40(II), 102nd Cong., 1st Sess., at 41 (1991) (*reprinted in* 2 1991 U.S.C.C.A.N. 694, at 735).[6]

In light of *Gilmer*'s holding that Congress's intent to preclude compulsory arbitration of a given class of statutory claims hinges on an investigation into the text and legislative history of the specific statute and any amendments, the legislative history of the 1991 amendments to Title VII demonstrates that compulsory arbitration of claims brought under that title is precluded. Because the FAA therefore does not require compulsory arbitration of federal statutory race discrimination claims, neither does it operate to preempt state law in this area.

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[6] A number of federal cases decided since *Gilmer* have addressed the decision's applicability to Title VII claims and have concluded that such claims, like those brought under the ADEA, are subject to compulsory arbitration under the terms of a Form U-4 arbitration provision. *See Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992); *Bierdeman v. Shearson Lehman Hutton, Inc.*, 963 F.2d 378 (9th Cir. 1992) (Table), *cert. denied*, ___ U.S. ___, 113 S. Ct. 328 (1992); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991). Yet, ***not one*** of these courts was presented with or considered the legislative history which Fletcher set forth in his argument to the Court of Appeals.

Alford and *Willis* were decided before the Civil Rights Act of 1991 was enacted, and thus could not consider the legislative history of the Act. Moreover, it is clear from the face of the decisions in each of the cases cited above that these respective courts did not consider the legislative history of the 1991 amendments to Title VII.

III.

THE RIGHT TO BE FREE OF DISCRIMINATION BASED ON RACE IS OF A MAGNITUDE BEYOND OTHER STATUTORY RIGHTS, AND CANNOT BE ADEQUATELY PROTECTED BY INDUSTRY-SPONSORED ARBITRAL FORUMS

The right to be free of race discrimination has been protected with special vigor by Congress and this Court. While all forms of discrimination are abhorrent, discrimination on the basis of race poses a particular threat to the fabric of our society. With good fortune, all of our citizens, regardless of race or religion, can expect to confront the afflictions of age (which was the subject of *Gilmer*), but race is an unalterable characteristic from the time of one's birth. Discrimination based on race — directed at a particular class of citizens — carries vastly greater potential for societal divisiveness. Thus, guarding against this form of discrimination justifies heightened judicial vigilance.

The 14th amendment was drafted to address the nation's history of racial segregation and discrimination, *see* Tribe, *American Constitutional Law* (2d ed.) § 16-21, at 1516 (1988) ("[t]he Civil War Amendments were drafted specifically to overturn that odious hierarchy [of racial subjugation]"), and this Court has consistently treated classifications by race as inherently suspect and subject to strict scrutiny under the Constitution, while applying a lesser standard to classifications based on gender or age. *See* Tribe, *American Constitutional Law* § 16-25, at 1558-59.[7] The reasoning

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[7] Although the Court has applied a "minimum rationality" test to age-based classifications, *see e.g.*, *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (per curiam); *Vance v. Bradley*, 440 U.S. 93 (1979), it has never accorded to age protected status under the 14th amendment. *See EEOC v. Wyoming*, 460 U.S. 226, 260 (1983) (Burger, C.J., dissenting) ("no one — not

of the Court of Appeals, however, fails to recognize that race discrimination has occupied a more significant role historically, and has often required more direct judicial intervention, than other forms of discriminatory conduct.

The securities industry's sponsorship of arbitration against its members, and its screening and pre-selection of all the arbitrators, creates a situation designed to perpetuate, rather than eliminate, racial inequities in an industry that thus far has not been known for its hospitality to racial minorities. Thus, there is an "inherent conflict" between statutes designed to eliminate racial discrimination and enforcement of these statutes through securities industry-sponsored compulsory arbitration.[8]

In their dissent in *Barrentine*, former Chief Justice Burger and then-Associate Justice Rehnquist identified the risk of allowing an industry tainted by discrimination — there, a union bargaining on behalf of women — to adjudicate such claims. In objecting to the *Barrentine* majority's extension of the holding of *Alexander* to wage claims brought under the Fair Labor Standards Act, the dissenters

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the Court, not the Congress — has determined that mandatory retirement plans violate any rights protected by [the 13th, 14th, and 15th] amendments").

[8] As one of the sponsors of the proposed Securities Arbitration Reform Act of 1988, H.R. 4960, 100th Cong., 2d Sess. (1988), which would have barred pre-dispute arbitration agreements for customers, recently wrote in a letter to the chairmen of both the SEC and EEOC, it is "difficult to imagine that Congress would have intended private contractual rights to eviscerate laws protecting employees against . . . discrimination. This is particularly so with regard to an industry-wide practice, where the prospective employee may have no recourse but to submit to such a condition of employment." Letter from Rep. Edward J. Markey to Evan J. Kemp, Jr., dated May 23, 1991; letter from Rep. Edward J. Markey to Hon. Richard C. Breeden, dated May 23, 1991 (both *cited in GAO Probe Of Industry Arbitration of Job Discrimination Nears End*, Sec. Reg. & L. Rep. (BNA) Vol. 25, No. 5, at 185 (Feb. 5, 1993)).

argued that *Alexander* should not be extended to statutory claims not involving discrimination. As they noted:

> "Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens."

450 U.S. at 750.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

Dated: New York, New York
October 7, 1993

Respectfully submitted,

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APPENDICES

APPENDIX A
OPINION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

State of New York Court of Appeals

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

1 N. 126

ALPHONSE FLETCHER, JR.,

Appellant,

v.

KIDDER, PEABODY & COMPANY, INC.,

Respondent.

1 No. 127

RITA REID,

Appellant,

v.

GOLDMAN, SACHS & CO. ET AL.,

Respondents.

No. 126:
Stanley S. Arkin, for appellant
Ronald M. Green, for respondent.
Securities Industry Association, Inc.; and Equal Employment Advisory Council, *amici curiae*
No. 127:
Stephen E. Tisman, for appellant
Theodore O. Rogers, Jr., for respondents.
National Employment Lawyers Association/New York, *amicus curiae*

TITONE, J.:

In *Matter of Wertheim & Co. v Halpert* (48 NY2d 681), this Court held that because of the strong public policies embodied in federal, State and local anti-discrimination laws, anticipatory agreements to arbitrate are unenforceable in the context of disputes involving claims of unlawful discrimination. The issue before us on these appeals is whether subsequent case law has rendered that holding obsolete in cases where the enforceability of the arbitration clause is governed by the Federal Arbitration Act (the "FAA") (9 USC § 1, *et seq.*). We hold that, in light of recent Supreme Court decisions, most notably the Court's decision in *Gilmer v Interstate Johnson/Lane Corp.* (500 US__, 111 S Ct 1647, our 1979 decision in *Wertheim* should no longer be followed in cases governed by the FAA. Instead, the arbitrability of statutory discrimination claims is henceforth to be determined by reference to Congress' intent with regard to alternative dispute resolution of that class of claims.

Fletcher v Kidder, Peabody & Co.

Plaintiff, an African-American formerly employed in defendant's equity trading department, commenced this judicial action under the State Human Rights Law, alleging that he had been the victim of racial discrimination in employment in violation of Executive Law § 296(1)(a). In response, defendant moved to stay the action and compel arbitration on the basis of the broad arbitration clause contained in the Uniform Application for Securities Registration Transfer (the "U-4 Form") that plaintiff had signed as part of his application for registration with the various securities exchanges.[1]

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[1] Under paragraph 5 of the U-4 Form he executed, plaintiff promised "to arbitrate any dispute, claim or controversy that may arise between [himself] and [his] firm * * * that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which I register." Rule 347 of the New York Stock Exchange requires arbitration of "any controversy between a registered

The motion was predicated on defendant's contention that the FAA, which preempts state law, is applicable and that that federal statute mandates enforcement of plaintiff's promise to submit "controversies * * * arising out of [his] employment" to arbitration.

The IAS court denied the motion, reasoning that "it would be against public policy to contract in advance for a [waiver of the right to obtain judicial redress of alleged racial discrimination." The Appellate Division, however, reversed and granted the requested relief after concluding that the FAA and the cases decided under that statute mandated enforcement of plaintiff's arbitration agreement (183 AD2d 359).

Reid v Goldman, Sachs & Co.

Initially hired as a research assistant, plaintiff subsequently became a registered securities representative for defendant investment firm. As a part of her registration application filled with the New York Stock Exchange, plaintiff was required to execute a U-4 Form containing a broad agreement to submit disputes arising out of her employment to arbitration. Some thirteen years later, plaintiff was terminated from her position as a Vice President within defendant's firm.

Following her termination, plaintiff commenced the present action, alleging that she had been the victim of gender-based discrimination in violation of the State Human Rights Law (Executive Law § 290, *et seq.*). In response, defendant invoked the arbitration clause in the U-4 Form plaintiff had signed, contending that the dispute fell within the clause's terms and that the FAA mandated the clause's enforcement.

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representative and any member or member organization arising out of the employment or termination of employment of such registered representative."

The IAS court held in defendant's favor, concluding that plaintiff was obliged to arbitrate the discrimination claim. On plaintiff's appeal, the Appellate Division affirmed. Relying on *Gilmer v Interstate Johnson/Lane Corp. (supra)*, the court reasoned that plaintiff could be "compelled to arbitrate a state-based sex discrimination claim under the [FAA]" (___AD2d___).

I.

We begin with the premise, which is now well embedded in our case law, that the enforceability of the arbitration clause contained in these plaintiffs' U-4 Form applications is governed by the FAA *(see, Singer v Jeffries*, 78 NY2d 76, 81; *Flanagan v. Prudential-Bache Securities, Inc.*, 67 NY2d 500). A further basic principle that is essential to our analysis is the corollary tenet that, in situations where the FAA is applicable, it preempts state law on the subject of the enforceability of arbitration clauses (*Southland Corp. v. Keating*, 465 US 1; *see, Singer v Jeffries, supra*, p 81). Indeed, the provisions of the FAA are controlling even though the dispute itself may arise under state law *(see, Southland Corp. v Keating, supra)*. Thus, regardless of what our own State's policies or case law might dictate in other circumstances, we are bound by the policies embodied in the federal statute and the accompanying case law, and our prior state-law holdings remain independently operative only to the extent that they have not been preempted by federal law and policy.

In *Matter of Wertheim & Co. v Halpert (supra)*, this Court held that an arbitration clause contained in a U-4 Form similar to those signed by plaintiffs was unenforceable in a dispute concerning a claim of discriminatory conduct in employment. At that time, the Court reasoned that important public policies are implicated in this area "where particular remedies are afforded by both State and Federal statutes" and, further, that allowing the employer to force the employee into arbitration "risks chilling the exercise of the

statutory right" (*id.*, p 683). The FAA and the impact of federal law were not discussed, although the Court did make passing reference to *Alexander v Gardner-Denver Co.* (415 US 36), an employment discrimination case involving an arbitration clause that was not governed by the FAA.

The legal developments in the thirteen years since *Wertheim* was decided necessitate a re-examination of that precedent. Although the United States Supreme Court has not squarely and directly addressed the enforceability of anticipatory arbitration clauses for disputes involving statutory prohibitions against racial and gender discrimination, it has considered the same issue in the context of a statutory age discrimination dispute and, in the process, has established a clear analytical framework for use in all cases in which an FAA-governed arbitration contract is invoked to force a nonjudicial resolution of a claim arising from statute (*Gilmer v Interstate Johnson/Lane Corp.* (500 US __, 111 S Ct 1647).

Contrary to the dissent's urgings, we cannot cling to the thirteen-year-old holding in *Wertheim* in the face of this recent definitive Supreme Court ruling solely because the nature of the statutorily prohibited discrimination alleged in *Gilmer* differs from the types of statutorily prohibited discrimination challenged in these two cases (*see, Alford v Dean, Witter Reynolds, Inc.*, 500 US __, 111 S Ct 2050, *on remand*, 939 F2d 229 [remanding for reconsideration of arbitrability of Title VII gender discrimination claim in light of *Gilmer v Interstate Johnson/Lane Corp., supra*). While adherence to state precedent may be justified in the absence of clear guidance from the Supreme Court (*see, Herzog Bros. v State Tax Commn.*, 72 NY2d 720), we are bound to follow both the holding and the rationale of the nation's highest Court on this and other questions of federal law when, as here, there is no ambiguity in the Court's position (*see, Flanagan v Prudential-Bache Securities, Inc., supra*,

pp 505-506).[2] Indeed, any argument about the continued vitality of *Wertheim* is, necessarily, a "red herring," since, as the dissent itself acknowledges, even the plaintiff in *Fletcher* would utilize the methodology mandated in *Gilmer v Interstate Johnson/Lane Corp. (supra)* to establish his right to be relieved of the obligations imposed by his agreement to arbitrate (dissent, slip op., p 4).[3]

Under that methodology, the party seeking to avoid enforcement of an arbitration clause governed by the FAA must demonstrate a congressional intent "to preclude a waiver of a judicial forum" for disputes based on a particular statutory right (*Gilmer v Interstate Johnson/Lane Corp., supra*, 111 S Ct, p 1652; *see also, Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*, 473 US 614; *Singer v Jeffries & Co.*, 78 NY2d 76, *supra; cf., Alexander v Gardner-Denver Co.*, 415 US 36, *supra* [involving arbitration agreement that was *not* subject to the FAA]). Where the right is predicated on a state or local statute rather than a congressional enactment, it is undisputed by these parties that the courts are obliged to draw an analogy to the equivalent federal law, where possible,

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[2] To the extent that the dissent's argument is directed toward the wisdom of the United States Supreme Court's recent pronouncements on the subject before us (see, dissent, slip op., at p 16), its arguments are misdirected. In this area, which is governed by pre-emptive federal statutes, the Supreme Court's decisions are unquestionably the final word and, as such, are not subject to second-guessing at the state level.

[3] Similarly, the dissenter's extensive reliance on the holding and rationale of *Alexander v Gardner-Denver Co.* (415 US 36, *supra*) is misplaced. While that case involved the arbitrability of a dispute arising under Title VII, the arbitration agreement in issue was not one governed by the FAA (*see, Gilmer v Interstate Johnson/Lane Corp., supra*, p 4411), with its "liberal federal policy favoring arbitration" (*Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc., supra*, p 625). As the dissent itself acknowledges (slip op., at p 6), the Supreme Court made clear in *Gilmer* that *Alexander* is not relevant where the congressionally adopted FAA is controlling.

and to consider Congress's intentions with regard to the rights created by that law.[4]

The closest federal analog to Executive Law § 296 (1)(a), under which these plaintiffs' claims arise, is Title VII of the Civil Rights Law (42 USC § 2000e *et seq.*). Contrary to the *Fletcher* plaintiff's contentions, there is nothing in the legislative history of either that federal statute itself or the recently adopted amendments to that statute (Pub L 102-166, 105 Stat 1071 [the Civil Rights Act of 1991]) that would suggest the existence of a congressional intent to override the general rule that anticipatory contracts to arbitrate are enforceable under the FAA.

The amendment that the dissent cites, which authorizes the use of alternative dispute resolution methods for controversies arising under Title VII (42 USC § 118), merely adds to the existing, statutorily created right to seek relief in judicial and administrative forums (*see*, 42 USC § 2000e-5[b], [c], [f]). That amendment does not shed any light on Congress's intentions with regard to anticipatory agreements to use arbitral forums in the event of a future dispute. It is true that the stated amendment's co-sponsor,

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[4] For this reason, the dissent's reliance on article I, § 11, of the State Constitution and the anti-discrimination provisions of the State Human Rights Law (Executive Law §§ 290[2], 291, 297[9]; *see*, slip op., at pp 12-13) is puzzling. No party to this litigation has suggested that the intentions of the New York State Legislature or the framers of the State Constitution should be consulted in resolving this question concerning the proper application of federal law. Moreover, the state law that the dissent cites does not support the dissent's primary contention that racial discrimination should be treated differently from other forms of discrimination for purposes of determining the proper remedial forum. Executive Law § 297(9), which provides for a judicial cause of action for unlawful discrimination, does not distinguish between the various forms of discrimination and, in fact, treats racial discrimination the same way as it treats discrimination "because of age, * * * creed, color national origin, sex [and] marital status" (*see, id.*, § 291).

Congressman Edwards, stated in the Congressional Record that the amendment was "intended to be consistent with decisions such as *Alexander v Gardner-Denver Co. [supra]*, which protects employees from being required to agree in advance to arbitration" and that "[n]o approval whatsoever is intended of the Supreme Court's recent decision in *Gilmer v Interstate Johnson/Lane Corp. [supra]* * * * or any application or extension to it" (137 Cong Rec H9530 [daily ed November 7, 1991). However, this statement cannot be viewed as indicative of the intentions of Congress as a whole, since it expresses only the position of the individual legislator who made it.

Similarly, the Reports of the House Education and Labor Committee (H.R. Rep. No. 102-40[I], 102nd Cong - 1st Sess 97, *reprinted in* 2 [1991] US Code, Cong & Admin News [1991] 549, 635) and the House Judiciary Committee (HR Rep No 102-40[II], 102nd Cong, 1st Sess 41, *reprinted in* 2 [1991] US Code, Cong & Admin News 694, 735), on which the plaintiff in *Fletcher* relies, are not useful indicators of congressional intent with regard to the enforceability of arbitration contracts in Title VII disputes. While those Reports have more persuasive value than do Rep. Edwards' personal remarks in terms of their ability to reflect Congress' intent, they are not particularly helpful to plaintiffs' positions here, because they merely set forth the Committees' *understanding* of the enforceability of arbitration agreements in discrimination disputes under the then-existing Supreme Court precedent. Indeed, the section of the Committee Report on which the dissent relies states only that the Committee "*believes* that any agreement to submit disputes to arbitration *** does not preclude the affected person from seeking relief under the enforcement provisions of Title VII[, a] view [which] is consistent with the Supreme Court's interpretation of Title VII in *Alexander v Gardner-Denver Co. [supra]*" (H.R. Rep. No. 102-40, *supra* [emphasis added]). This section, of course, says nothing about what Congress actually *intended*.

It is true that the legislative history of Title VII and its recent amendments does not demonstrate that Congress affirmatively intended to authorize anticipatory agreements to arbitrate of claims arising from the statute's provisions. However, the *Gilmer* formula makes such a showing unnecessary. The FAA itself evidences a broad congressional intention to enforce agreements to arbitrate in accordance with their terms. Thus, under *Gilmer*, the burden is on the party seeking to avoid arbitration of a statutory claim to show that Congress specifically intended to preclude waivers of the right to judicial remedy for such claims. Here, the cited legislative history does not satisfy that burden. Consequently, in the absence of clear and unambiguous proof of legislative intent to the contrary, we are obliged to hold that these cases are governed by the presumption of arbitrability that is established by the FAA.

II.

Since there is no evidence that Congress intended to limit the enforceability of FAA-governed arbitration agreements in the context of this class of disputes, the courts below were correct in concluding that plaintiffs' State Human Rights Law claims should be submitted to arbitration under the terms of the U-4 Forms they signed. To the extent that our decision in *Matter of Wertheim & Co. v Halpert* (48 NY2d 681, *supra*) suggests the contrary, it has been superseded by subsequent Supreme Court precedent and is not to be followed.

In response to the dissent's argument that the waiver of judicial review implicit in plaintiff's U-4 Form should not be enforced because it was "involuntary" (slip op., at p 15), we note only that the argument cannot be maintained in light of *Gilmer v Interstate Johnson Lane Corp. (supra)*, as well as *Singer v Jeffries (supra)* and *Flanagan v Prudential-Bache Securities, Inc. (supra)*. In each of those cases, the arbitration agreement contained in the U-4 Form was enforced even though the agreement had been signed as a

condition to becoming a registered representative and a refusal to sign would have meant "exclusion from the industry" (dissent, slip op., at p 15). Indeed, the dissent cannot seriously suggest that the various financial exchanges cannot enforce the thousands of U-4 Forms that have been signed by would-be registrants, since such a conclusion would destabilize longstanding practices in this highly regulated industry and would wreak havoc with the regulatory system.

Similarly, the concerns about the adequacy of the arbitral forum that plaintiffs and the dissent raise have already been considered, and presumably balanced, by the Congress that enacted the FAA and thereby expressed its own preference for enforcing the parties' arbitration agreements. To the extent that the Supreme Court expressed a degree of mistrust for the arbitral process in *Alexander v Gardner-Denver Co.* (*supra*, pp 57-58), that sentiment has clearly been supplanted by the more current view that arbitration is an important and respected method of resolving private disputes (*see, Gilmer v Interstate Johnson/Lane Corp., supra*, 111 S Ct 1654-1655, n 5; *see also, Shearson/American Express, Inc.*, 482 US 220, 231-232). Indeed, as the Supreme Court noted in *Rodriguez de Quijas v Shearson/American Express, Inc.* (490 US 477, 481), concerns about arbitration "as a method of weakening the protections afforded in the substantive law to would-be complainants" are "far out of step with [the] current strong endorsement [by the federal courts] of the *** statutes favoring this method of resolving disputes." While the submission of a dispute to arbitration inevitably does involve the loss of some procedural rights, a party who agrees to arbitration "trades th[ose] procedures and [the] opportunity for review *** for the simplicity, informality and expedition of arbitration" (*Mitsubishi v Motors Corp. v Soler Chrysler-Plymouth, Inc, supra*, p 628). [emphasis supplied]) The value that expeditious resolution may have to a person deprived of his or her statutory rights is an element that the dissent's discussion of the weakness of the arbitral forum completely overlooks.

Finally, we stress that there is no disagreement among the members of this Court about the general proposition that racial, gender, and all other forms of invidious discrimination, are "ugly realit[ies]" that cannot be countenanced and that should be redressable through the widest possible range of remedies (*see*, dissent, slip op., pp 15-16). However, the issue before us is not whether discrimination is a social evil that should be eradicated with whatever tools we have. Rather, the issue is whether, under existing precedent, the important public policies underlying Title VII of the federal Civil Rights Act may be deemed to override the "'emphatic' national policy favoring arbitration" (*Singer v Jeffries, supra*, pp 81, *quoting Cone Mem. Hosp. v Mercury Constr. Corp.*, 460 US 1, 24-25), as reflected in the FAA. The Supreme Court has already ruled, in the context of an age-discrimination suit arising under the Age Discrimination in Employment Act (29 USC § 621, *et seq.*), that the proper question is not whether the courts can discern a sound reason in public policy to refuse enforcement of FAA-governed arbitration contracts, but rather whether Congress, in creating a statutory remedy, intended that arbitration of the statutorily-established claim would be foreclosed (*Gilmer v Interstate Johnson/Lane Corp., supra*). The dissent has offered no principled reason to apply either a different analysis or a different remedy in cases in which the statutorily-based claim involves discrimination on the basis of the claimant's race rather than the claimant's age, gender, religion or national origin.

III.

Having concluded that there is nothing in the language or history of the relevant federal statutes to indicate a congressional intent to foreclose arbitration of race- and gender-discrimination claims, we turn now to the sole argument raised by the plaintiff in *Reid*: whether the arbitration clause in the U-4 Form that she and many others in financial services industry have signed is an agreement governed by the FAA. The gist of the *Reid* plaintiff's argument is that the U-4

Form is, in essence, a contract of employment and that it is therefore within the exclusionary provisions of section 1 of the FAA (9 USC § 1). That section provides that the terms of the FAA, including its provisions for enforcement of arbitration agreements, do "not apply to contracts of employment of seamen, railroad employees or any other class of workers."

The federal courts have debated the scope of this statutory exclusion. A majority of the lower federal courts that have considered the issue have held that the exclusion is not limited to employment contracts of seamen, railroad employees and other classes of workers *within the transportation industries*, but rather extends to employment contracts in all industries (*e.g., Willis v Dean, Witter, Reynolds, Inc.*, 948 F2d 305; *Occidental Chem. Corp. v Local 820, Int'l Chem. Workers Union*, 853 F2d 1310). Although the issue was raised and briefed by several of the *amicus curiae* in *Gilmer v Interstate Johnson/Lane Corp.* (*supra*, pp 1651-1652, n 2), the Supreme Court declined to resolve it there. Indeed, the *Gilmer* Court concluded that resolving the question was unnecessary because the arbitration agreement before it, the plaintiff's U-4 Form application, was "a contract with the securities exchanges, not with [the plaintiff's] employer" and, thus, was not a "contract of employment" at all (*id.*).

In view of this clear holding, the *Reid* plaintiff's present contention that the U-4 Form she signed was a "contract of employment" within the meaning of the section 1 exclusion cannot be maintained. Contrary to plaintiff's assertions on this appeal, the Supreme Court's unambiguous statement rejecting the proposition she now advances cannot fairly be characterized as mere dictum, since that statement was essential to the Court's ultimate holding. And, contrary to the dissent's suggestion that the *Gilmer* holding "does not say that a U-4 Form can never be a part of an employment contract" (slip op., at p 8), the statement of the *Gilmer* Court on this issue was clear and unequivocal and was obviously intended to

establish a principle of law that would extend to all cases involving U-4 Forms executed as part of an individual's application for registration with a regulated exchange. Accordingly, any attempt to bring the standard U-4 Form application within the exclusion provided in section 1 of the FAA is foreclosed by the *Gilmer* Court's definitive rejection of that position.[5]

In sum, the arbitration agreement contained in the U-4 Form application that these plaintiffs signed is within the class of agreements that are governed by the FAA. Further, under the language of that statute as well as the recent decisional law construing it, that arbitration agreement is fully enforceable in disputes that fall within its terms, even where the underlying claim concerns an alleged breach of a local, state or federal law barring racial or gender discrimination. While those categories of disputes undoubtedly implicate important public policies and as such, demand heightened sensitivity in decision-making, there is no reason to assume that such sensitive decision-making cannot be had in the arbitral forum. Even more importantly, there is nothing in the present body of federal law that supports carving out a special "public policy" exception from the general rule of arbitrability mandated by the FAA.

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[5] The dissent's suggestion that the issue is one that the Supreme Court has "'left for another day'" is simply inaccurate (*see*, slip op., at p 9). As it is quoted in the dissenting opinion itself, the Supreme Court's opinion in *Gilmer* makes clear that the Court chose to "follow the weight of authority and * * * *hold* that § 1's exclusionary clause does not apply to" the U-4 Form used in the securities industry (111 S Ct, pp 165-1652, n2 [emphasis supplied]). As previously noted, the question "le[ft] for another day" was not whether U-4 Forms are "employment contracts" within the meaning of the section 1 exclusion from the FAA's coverage, but whether the exclusion applies to all employment contracts rather than being limited to employment contracts in the transportation industry alone.

Accordingly, the orders of the Appellate Division in *Fletcher v Kidder, Peabody & Co.* and *Reid v Goldman, Sachs & Co.* should be affirmed, with costs.

APPENDIX A1

Fletcher v Kidder, Peabody & Co.

No. 126

SMITH, J. (dissenting):

The majority opinion erroneously applies the holding in *Gilmer v. Interstate Johnson/Lane Corp.*, (500 US ___, 111 S.Ct. 1647) to claims of racial discrimination, ignores *Alexander v Gardner-Denver Co.* (415 US 36), unnecessarily overrules *Matter of Wertheim & Co. v Halpert* (48 NY2d 681) and on the basis of an inapplicable footnote in a Supreme Court opinion, abandons the statutory and constitutional mandate to resolve racial discriminatory disputes in a court of law and in accordance with the equal protection of the laws. Accordingly, I dissent.

The issue before the Court is whether Federal substantive law permits the compulsory arbitration of claims of racial discrimination in employment in violation of state law. Plaintiff, an African-American male graduate of Harvard College, commenced this action, pursuant to the Human Rights Law, alleging constructive discharge from his employment as a result of racial discrimination. Plaintiff is a registered broker-dealer with the New York Stock Exchange, the National Association of Securities Dealers and the American Stock Exchange. From November 1989 until his resignation in March 1991, plaintiff was employed by defendant as a Trader Analyst. As a condition of his employment, plaintiff was required to execute the standard Uniform Application for Securities Industry Registration or Transfer, the so-called "U-4 Form", which compels arbitration of any dispute between plaintiff (registered representative) and defendant (member) required by the exchanges to be arbitrated.

The complaint alleges that plaintiff resigned his position after a dispute over compensation. Specifically, it is contended that under

the terms negotiated with a managing director of Kidder, Peabody, his annual compensation was to be no less than 20%, and no more than 25%, of his trading profits and that his 1990 bonus payment would be paid no later than early 1991. It is further alleged that plaintiff generated net profits of over $25.2 million in 1990, the largest in his department, entitling him to between $5 and $6.5 million in compensation. It is further alleged that defendant concluded that "the amount it was obligated to pay Mr. Fletcher was simply too much money to pay a young black man." Thus, defendant allegedly reneged on the agreement by withholding 50% of his bonus compensation, deferring payment for up to 18 months, and requiring him to pay for trading losses on a dollar for dollar basis—all terms to which plaintiff's white counterparts were not subjected. Plaintiff, in part, bases his contention that these breaches were racially motivated on a conversation he allegedly had with defendant's head of human resources/equal employment opportunity officer wherein plaintiff was advised that he should not complain because he was "one of the highest paid black males" in the country. Subsequently, plaintiff resigned, submitted his contract dispute to arbitration and commenced this action.

Defendant moved to stay the action and compel arbitration of the racial discrimination claim pursuant to sections 2, 3 and 4 of the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, and CPLR 7503 (a). The Supreme Court denied the motion, concluding that "(t)he simple act of accepting employment and agreeing to arbitration does not constitute a waiver of the right to seek redress in a judicial forum for alleged racial discrimination" and that "it would be against public policy to contract in advance for a limiting forum to hear such claims."

The Appellate Division reversed, on the law, and granted the motion, thereby staying the action and directing plaintiff to proceed to arbitration. Essentially, the Appellate Division concluded that the motion court had misconstrued and misapplied Supreme Court cases

it held to be controlling—specifically, *Gilmer* and *Alford v Dean Witter Reynolds, Inc.* (500 US __, 111 S.Ct. 2050, *on remand* 939 F2d 229 [5th Cir 1991]). The Appellate Division construed Federal case law to pose no barrier to compulsory arbitration of statutory employment discrimination claims such as the case at bar (*Fletcher v Kidder, Peabody & Co.* 184 AD2d 359, 361-362). This court granted leave to appeal.

Before this court, plaintiff argues that Federal law favoring arbitration does not preempt New York law because the legislative history of the Civil Rights Act of 1991, *i.e.*, the amendments to Title VII of the Civil Rights Act of 1964 (42 USC § 2000e *et seq.*), demonstrates the intent to preclude compulsory arbitration of race discrimination claims. This Federal legislation corresponds to the Human Rights Law and, pursuant to Federal law, that intent to preclude such compulsory arbitration is extended to analogous state claims. Plaintiff cites the House of Representatives Education and Labor Committee Report which mirrored the language of the Report of the House Judiciary Committee that its approval of alternate dispute resolution mechanisms was not intended "to preclude rights and remedies that would otherwise be available."[1]

Plaintiff argues also that the waiver of the right to a judicial determination of a racial discrimination claim should be permissible only after the claim has arisen. He contends further that the prospective waiver of this right is contrary to public policy because potential minority securities industry employees should not be

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[1] H.R. Rep. No. 102-40(I), 102nd Cong., 1st Sess., at 97 (1991) and H.R. Rep. No. 102-40(II), 102nd Cong., 1st Sess., at 41 (1991) and the interpretive memorandum of the co-sponsor of the 1991 amendments, *Interpretive Memorandum on the Civil Rights Act of 1991*, 137 Cong. Rec. H9530 (daily ed. Nov. 7, 1991) as authoritative statements of the legislative intent. Plaintiff argues further that State constitutional, statutory and decisional law preclude the arbitration of the dispute here.

required to anticipate that they will be subjected to discrimination and that such a claim would best be resolved by an industry-sponsored, industry-screened, and industry-selected tribunal.

Defendant contends that the execution of the arbitration agreement was voluntary and, therefore, binding and that Federal laws establishes that compulsory arbitration of a claim of racial discrimination under these circumstances is permissible. Plaintiff's contentions are disputed by defendant and it is alleged that the arbitration procedures are fair and adequate.

In *Gilmer*, the Supreme Court held that a claim pursuant to the Age Discrimination in Employment Act (ADEA), 29 USC § 621 *et seq.*, could be subjected to compulsory arbitration (111 S Ct, at 1650). There the respondent Interstate/Johnson Lane Corporation had hired Gilmer as a Manager of Financial Services in May 1981. Gilmer, as a condition of employment, had to register as a securities representative with several stock exchanges. The registration application, the U-4 Form, committed all disputes between Gilmer and his employer to arbitration. Gilmer was terminated after 6 years, at age 62. Gilmer subsequently brought suit in US District Court pursuant to the ADEA and he filed claim with the Equal Employment Opportunity Commission (EEOC). The employer moved without success, to compel arbitration, but the Fourth Circuit Court of Appeals reversed.

In upholding the compulsory arbitration of Gilmer's claim, the Supreme Court reasoned (1) that compulsory arbitration of an age discrimination claim was not inconsistent with the underlying social policy of the ADEA (111 S Ct, at 1653); (2) that claimant remained free to file charges with the EEOC (*id.*); (3) that there was no evidence of Congressional intent in the ADEA to preclude the waiver of the judicial forum (111 S Ct, at 1653-1654); (4) that the arbitration procedures were adequate (111 S Ct, at 1654-1655); and (5) that *Alexander v Gardner-Denver Co., supra*, (415 US 36) and

its progeny were not controlling because they did not involve the compulsory arbitration of a statutory claim, the arbitration clauses at issue were in the context of collective-bargaining agreements, and the FAA was not applicable (111 S Ct, 16 1656-1657). In addition, without determining the scope of the exclusion in section 1 that the FAA did not apply to "contracts of employment * * * of workers engaged in foreign or interstate commerce", the Supreme Court held in a footnote "that § 1's exclusionary clause does not apply to Gilmer's arbitration agreement" because the U-4 Form was not a part of his employment contract (111 S Ct, at 1651-1652 n 2).

The dissenters, Justices Stevens and Marshall, questioned the majority's failure to address the issue of whether the FAA was applicable to employment contracts and concluded that the majority had construed the section 1 exclusion too narrowly. The dissenters would read section 1 to exclude "any agreements by the employee to arbitrate disputes with the employer arising out of the employment relationship, particularly where such agreements to arbitrate are conditions of employment" (111 S Ct, at 1659). The dissenters also stated that compulsory arbitration conflicted with the legislative intent evidenced in the ADEA (111 S Ct, at 1660-1661).

As stated, in this case the majority opinion erroneously applies *Gilmer* to the facts here, without necessity or justification overrules the decision in *Wertheim* and, on the basis of an inapplicable footnote in a Supreme Court decision, abandons the statutory and constitutional mandate to resolve claims of racial discrimination in the courts and in accordance with the equal protection of the laws.

First and foremost, the majority misapplies *Gilmer* to the facts here. *Gilmer* is distinguishable from the case at bar. *Gilmer* is not a racial discrimination case and, in fact, does not mention racial discrimination. The Supreme Court has neither addressed the precise issue before us nor provided any indication that *Gilmer* would sanction the compulsory arbitration of racial discrimination

claims.[2]

Footnote two, which the majority contends excludes the U-4 agreement from being a part of any employment contract, does no such thing. It should be clear that the Supreme Court's holding in *Gilmer* was simply that a claim under the ADEA could be subjected to compulsory arbitration pursuant to an arbitration clause in a securities registration application (U-4) form. The holding in *Gilmer* is given in the first paragraph of the opinion. The Supreme Court stated:

> The question presented in this case is whether a claim under the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U.S.C. § 621 et seq., can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application. The Court of Appeals held that it could, 895 F2d 195 (CA4 1990), and we affirm (500 US, at ___, 111 S Ct, at 1650).

The holding does not say that a U-4 form can never be a part of an employment contract. Moreover, it does not say that any arbitration clause in a U-4 form can be used to compel arbitration of a racial discrimination claim.

The footnote in *Gilmer* should be interpreted for what it is, a determination that the U-4 agreement in *Gilmer*, as opposed to all cases, was not a part of an employment agreement. The Supreme Court did not hold there that such a U-4 agreement could never be a part of an employment contract. This view is confirmed, first, by

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[2] The Supreme Court's remand of *Alford v Dean Witter Reynolds, Inc.* (500 US ___, 111 S Ct 2050) "for further consideration in light of *Gilmer*" does not alter this fact. The Supreme Court specifically did not direct the court to decide the case as *Gilmer* was decided.

the Supreme Court's own reference to the fact that while several *amici curiae* argued that section 1 "excludes from the coverage of the FAA all 'contracts of employment'," Gilmer had not raised the issue in the lower courts or in his petition for certiorari.[3] It is confirmed, second, by the Supreme Court's statement that "we leave for another day the issue raised by *amici curiae*."

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[3] The entire footnote 2 reads as follows:

n2 Section 1 of the FAA provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Several amici curiae in support of Gilmer argue that that section excludes from the coverage of the FAA all "contracts of employment." Gilmer, however, did not raise the issue in the courts below, it was not addressed there, and it was not among the questions presented in the petition for certiorari. In any event, it would be inappropriate to address the scope of the § 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment. The FAA requires that the arbitration clause being enforced be in writing. See 9 U.S.C. §§ 2, 3. The record before us does not show, and the parties do not contend, that Gilmer's employment agreement with Interstate contained a written arbitration clause. Rather, the arbitration clause at issue is in Gilmer's securities registration application, which is a contract with the securities exchanges, not with Interstate. The lower courts addressing the issue uniformly have concluded that the exclusionary clause in § 1 of the FAA is inapplicable to arbitration clauses contained in such registration applications. See, e.g., *Dickstein v DuPont*, 443 F2d 783 (CA1 1971); *Malison v Prudential-Bache Securities, Inc.*, 654 F. Supp. 101, 104 (WDNC 1987); *Legg, Mason & Co. v Mackall & Coe, Inc.*, 351 F. Supp. 1367 (DC 1972); *Tonetti v Shirley*, 219 Cal. Rptr. 616, 618, 173 Cal. App.3d 1144 (1985); see also *Stokes v Merrill Lynch, Pierce, Fenner & Smith*, 523 F2d 433, 436 (CA5 1975). We implicitly assumed as much in *Perry v Thomas*, 482 US 483 (1987), where we held that the FAA required a former employee of a securities firm to arbitrate his statutory wage claim against his former employer, pursuant to an arbitration clause in his registration application. Unlike the dissent, see post, at 4-6, we choose to follow the plain language of the FAA and the weight of authority, and we therefore hold § 1's exclusionary clause does not apply to Gilmer's arbitration agreement. Consequently, we leave for another day the issue raised by amici curiae. (111 S Ct. at 1651-1652).

Second, the majority ignores *Alexander v Gardner-Denver Co., supra*, and overrules *Matter of Wertheim v Halpert, supra*, without necessity or justification. In the absence of an unequivocal ruling from the Supreme Court on this issue, this court should adhere to the principles articulated in *Alexander* and in *Wertheim*. In *Alexander*, the Supreme Court held that an employee's statutory rights to a trial *de novo* under Title VII of the Civil Rights Act of 1964 was not precluded by the prior submission of his claim to arbitration in accordance with a collective-bargaining agreement (415 US, at 52). The Supreme Court distinguished contractual rights from statutory rights and found no impediment to utilization of different forums to enforce those distinctly separate rights even though violation of those rights was based upon the same facts (415 US, at 49-51). The *Alexander* Court considered the purpose of Title VII—"to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin" (415 US, at 44)—,its statutory scheme of providing for consideration of employment discrimination claims in several forums (415 US, at 47), and its legislative history manifesting "a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes" (415 US, at 48). It also stated that, "we think it clear that there can be no prospective waiver of an employee's rights under Title VII" (415 US, at 51). Also, with respect to the arbitrability of a Title VII claim, the *Alexander* Court stated, "Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII [because among other things]* * * the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land * * * [and] the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be

given meaning only by reference to public law concepts" (415 US, at 56-57).

In *Wertheim* this Court declined to require arbitration of plaintiff's claim of sex discrimination against her employer, a member of the New York Stock Exchange. This court stated:

> [1] Although arbitration is a favored method of dispute resolution, arbitration agreements are unenforceable where substantive rights, embodied by statute, express a strong public policy which must be judicially enforced (*Matter of Sprinzen [Nomberg]*, 46 NY2d 623; see, also, *Matter of Aimcee Wholesale Corp. [Tomar Prods.]*, 21 NY2d 621). This is especially true in the area of discrimination where particular remedies are afforded by both State and Federal statutes (see *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 183-184).

Since *Wertheim* and even before, the policy of this State has been to resolve such claims of discrimination in the courts.

Third, it needs emphasis that equality of opportunity in employment in New York State is a civil right which is to be enforced by the courts. Article 1, § 11 of the State Constitution reads as follows:

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

The Human Rights Law is "deemed an exercise of the police power of the state * * * in fulfillment of the provisions of the constitution of this state concerning civil rights" (Executive Law § 290 [2]). The Human Rights Law makes the opportunity to obtain employment a civil right (Executive Law § 291). That section reads as follows:

> The opportunity to obtain employment without discrimination because of age, race, creed, color, national origin, sex or marital status is hereby recognized as and declared to be a civil right.

That civil right is protected by the right of an aggrieved person to go into a court of law.

The Human Rights Law expressly grants persons claiming to be aggrieved by an unlawful discriminatory practice, such as discrimination in employment on the basis of race, the right to seek judicial enforcement of State anti-discrimination laws. Thus Executive Law § 297(9) reads:

> Any person claiming to be aggrieved by an unlawful discriminatory practice *shall* have a cause of action in any court of appropriate jurisdiction for damages and such other remedies as may be appropriate, unless such person had filed a complaint hereunder or with any local commission on human rights, or with the superintendent pursuant to the provisions of section two hundred ninety-six-a of this chapter, provided that, where the division has dismissed such complaint on the grounds of administrative convenience, such person shall maintain all rights to bring suit as if no complaint had been filed (emphasis supplied).

The legislative history of the 1991 amendment of Title VII indicates that the Congressional intent was to preclude the

compulsory arbitration of racial discrimination claims. By addressing alternative dispute resolution methods and clarifying that they were not to preclude other available rights and remedies, Congress specifically articulated what was already implicit in the multiple forum scheme of Title VII—that these rights and remedies were coextensive.[4] A passage from the Education and Labor Committee Report supporting the amendments makes this clear. It reads:

> This section encourages the use of alternative means of dispute resolution, where appropriate and to the extent authorized by law. These methods include settlement negotiations, conciliation, facilitation, mediation, factfinding, mini-trials and arbitration.
>
> This amendment was adopted to encourage alternative means of dispute resolution that are already authorized by law. A virtually identical amendment was enacted as part of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*.
>
> The Committee emphasizes, however, that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract,

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[4] Under Title VII, employment discrimination claims may be considered in several forums (*see*, 42 USC § 2000e-5 [b] [1981 ed.] [EEOC]; 42 USC § 2000e-5 [c] [1981 ed.] [state and local agencies]; 42 USC § 2000e-5 [f] [1981 ed.] [federal courts]).

> does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII in *Alexander v Gardner-Denver Co.*, 415 US 36 (1974). The Committee does not intend for the inclusion of this section to preclude rights and remedies that would otherwise be available.[5]

The majority's decision sanctions the involuntary waiver of the statutory right to judicial review of a claim of racial discrimination. The waiver is involuntary because it is a condition of employment—failure to register precludes one from being a representative and registration requires agreement to arbitrate disputes with the employer. There is no negotiation of this term. Refusal means exclusion from the industry. Thus, this case arguably comes within the statement in *Gilmer* that "'courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds'" for revoking a contract (111 S Ct, at 1656 quoting *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*, 473 US 614, 627). The involuntariness of this waiver is highlighted by the fact that it is prospective. As noted above, the *Alexander* Court stated its objection to the prospective waiver of rights under Title VII and that objection has yet to be rescinded. Also, the waiver was not knowing because the fully panoply of rights now alleged to have been waived were in no way specified in the U-4 Form.

At the core of the instant controversy is racial discrimination—a reality that continues to hinder the full realization of the principles upon which this country was founded. The Supreme Court stated in

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[5] House Report No. 102-40 (II, p. 41).

Gilmer, "'[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function'" (111 S Ct, at 1653, quoting *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*, 473 US 614, 637). Although all forms of discrimination are reprehensible, as this statement recognizes, the remedies needed to eradicate one form of unlawful discrimination may be different from those needed to eliminate another form. This Court and any court should hesitate before forcing victims of discrimination into one single remedy, chosen by those who allegedly discriminated against them. The historical reality of racial discrimination as opposed to age discrimination would seem to compel a different treatment. Claims of racial discrimination have been a large part of litigation for over a century. Age discrimination claims have not. In the face of this history and without any evidence of the experience of courts dealing with the issues at the trial level, I cannot agree that these longstanding grievances can be arbitrated away.

Accordingly, the order of the Appellate Division should be reversed.

No. 126: Order affirmed, with costs. Opinion by Judge Titone. Chief Judge Kaye and Judges Simons, Hancock and Bellacosa concur. Judge Smith dissents and votes to reverse in an opinion.

No. 127: Order affirmed, with costs. Opinion by Judge Titone. Chief Judge Kaye and Judges Simons, Hancock and Bellacosa concur. Judge Smith took no part.

Decided July 9, 1993.

APPENDIX B
ORDER OF THE COURT OF APPEALS OF THE STATE OF NEW YORK, GRANTING LEAVE TO APPEAL

State of New York,

Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventh day of January A.D. 1993

Present, Hon. Richard D. Simons, Acting Chief Judge, presiding.

1-13 Mo. No. 1190

ALPHONSE FLETCHER, JR.,

Appellant,

v.

KIDDER, PEABODY & COMPANY, INC.,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted.

\Signature
Donald M. Sheraw
Clerk of the Court

STATE OF NEW YORK

Court of Appeals

\Seal
Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

DECISION January 7, 1993

1-13 Mo. No. 1190

ALPHONSE FLETCHER, JR.,

Appellant,

v.

KIDDER, PEABODY & COMPANY, INC.,

Respondent

Motion for leave to appeal granted.

APPENDIX C
OPINION OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

Milonas, J.P., Kupferman, Ross, Asch, Rubin, JJ.

46005N

ALPHONSE FLETCHER, JR.,
Plaintiff-Respondent,

-against-

KIDDER, PEABODY & COMPANY, INC.,
Defendant-Appellant.

Order, Supreme Court, New York County (Myriam J. Altman, J.), entered November 27, 1991, denying defendant's motion pursuant to section 2, 3, and 4 of the Federal Arbitration Act (9 USC §1-16) and CPLR 7503(a) to stay this action and to compel plaintiff to arbitrate his claim, of racial discrimination against it, reversed, on the law, the motion granted, this action stayed and plaintiff is directed to proceed to arbitrate his claim, without costs.

In accepting employment in defendant's equity trading department, plaintiff, who is black, executed the standard Uniform Application for Securities Industry Registration or Transfer, commonly referred to as a "U-4 Form" in which he agreed to arbitrate any dispute between him and his employer that the exchanges with which he is registered require to be arbitrated. On March 15, 1991, plaintiff resigned his employment and, thereafter, commenced this action, alleging that he was constructively discharged as the result of defendant's racial discrimination against

him in violation of the New York State Human Rights Law (Executive Law §296[1][a]).

The IAS court recognized that, although based upon an alleged violation of state law, plaintiff's claim is governed by the Federal Arbitration Act, which reflects the liberal federal policy favoring arbitration, and is encompassed in the broad arbitration agreement, which does not exclude statutory claims (*see, Gilmer v Interstate/Johnson Lane Corp.*,___US___, 111 S.Ct. 1647; *Dean Witter Reynolds, Inc. v Alford*, ___US___, 111 S.Ct. 2050, *on remand* 939 F2d 229). However, despite its recognition that plaintiff's claim is based upon an alleged violation of the Human Rights Law, the court found that, unlike *Gilmer* (*supra*) and *Alford* (*supra*) which involved claims of age and sex discrimination respectively, racial discrimination resulting from state action is prohibited by the United States Constitution and, that plaintiff's agreement to arbitrate did not constitute a knowing and voluntary waiver of his right to seek redress in a judicial forum for alleged racial discrimination.

While the court's condemnation of racial discrimination is commendable, its conclusion was erroneous in two respects: its inference that the racial discrimination alleged here resulted from state action; and, its conclusion that unlike other forms of discrimination, it would be against public policy and "immoral" to enforce agreements to arbitrate employment disputes involving claims of racial discrimination.

Regarding the first issue, it is clear that this litigation does not involve or assert a violation of any constitutional right resulting from state action. Rather, the alleged discrimination is purely a statutory claim arising under this state's Human Rights Law. As the court correctly noted, "[i]f a statutory claim is otherwise covered by an arbitration agreement, it is suitable for arbitration 'unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue' (*Mitsubishi Motors Corp.*

v *Soler Chrysler-Plymouth, Inc.*, 473 US 614, 628)." However, neither the court nor plaintiff has identified any such Congressional intent to preclude arbitration of the plaintiff's racial discrimination claim.

Indeed, the Supreme Court, in *Gilmer* (*supra*) put to rest any argument that its prior decisions, in *Alexander* v *Gardner-Denver Co.* (415 US 36) and its progeny, precluded arbitration of statutory employment discrimination claims. Notably, the *Gilmer* court never distinguished *Alexander* on the basis that it involved a sex discrimination claim pursuant to Title VII of the Civil Rights Act of 1964 (42 USC §§ 2000e to 2000e-17) and not an age discrimination claim under the Age Discrimination in Employment Act of 1967 (29 USC §626). Thus, as stated by the Fifth Circuit on remand in *Alford* v *Dean Witter Reynolds, Inc.* (939 F2d, *supra*, at 230), "Any broad public policy arguments against such a conclusion [that sex discrimination claims can be subjected to compulsory arbitration] were necessarily rejected by *Gilmer*."

Likewise, in providing a special exception for racial discrimination, the IAS court implied that other forms of discrimination are less detestable. However, such an inference lacks any foundation and, as recognized by plaintiff, any statement that racial discrimination claims implicate constitutional concerns while sex discrimination claims do not is erroneous as a matter of law since, although the 14th Amendment was adopted to redress this country's history of racial discrimination, it has long since been construed to prohibit sex discrimination as well.

Although enforcement of the Federal Arbitration Act is largely left to the state courts, it creates a body of federal substantive law which is not dependent upon the forum chosen to assert the right to arbitration.

Moreover, although a state court is not ordinarily precluded from exercising its own judgment nor bound to follow the decisions of

the Federal Circuit Court of Appeals encompassing its jurisdiction, it is bound to apply the statute as interpreted by the Supreme Court or in accordance with the rule established by lower federal courts, if they are in agreement (*Flanagan* v *Prudential-Bache Securities, Inc.*, 67 NY2d 500, 505-06, *cert. denied* 479 US 931).

Thus, notwithstanding plaintiff's contention that there is a "profound tension" or "disarray" between *Gilmer* and *Alexander*, and that the state of the law is in flux, federal law since *Gilmer* is completely uniform (*see, e.g., Alford* v *Dean Witter Reynolds, supra*; *Willis* v *Dean Witter Reynolds, Inc.*, 948 F2d 305; *Roe* v *Kidder Peabody & Co., Inc.*, 52 Fair Empl. Prac. Cas. [BNA] 1865, 1990 U.S. Dist. LEXIS 4536) and *Flanagan* simply does not apply. The United States Supreme Court's decisions in *Gilmer* and post-*Gilmer* case law are controlling and arbitration of plaintiff's racial discrimination claim should have been compelled.

All concur except Asch, J. who concurs in a memorandum as follows:

ASCH, J. (concurring)

I concur in the result and the reasoning of the memorandum for the list. I write here simply to point out that plaintiff has requested $25 million in punitive damages because of alleged racial discrimination by his former employer. Such a claim, if upheld by the arbitrator, would certainly warrant a substantial award to deter future similar conduct. However, pursuant to the present posture of the law of arbitration in New York, and award for punitive damages would be against the public policy of this state (*see, Dreyfus Serv. Corp. v. Kent*, __AD2d__, Appeal No. 45635 decided May 12, 1992, 1992 N.Y. App. Div. Lexis 6803, and concurrence by Asch, J., at __).

M-1992 Fletcher v. Kidder, Peabody & Company, Inc.

Defendant-appellant's motion to supplement the record on appeal is denied, without costs.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: June 18, 1992

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Clerk.

APPENDIX D
ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY

Supreme Court: New York County

IAS PART 14

ALPHONSE FLETCHER, JR.,

Plaintiff.

-against-

KIDDER, PEABODY & COMPANY, INC.,

Defendant.

Index No. 21739/91

MYRIAM J. ALTMAN, J.:

The issue on this motion is whether plaintiff can be compelled to arbitrate his claim of racial discrimination pursuant to an arbitration clause contained in an application for securities registration.

Plaintiff, a black male, was employed by defendant as a Trader Analyst from November 1989 until his resignation in March 1991. Upon commencing his employment, plaintiff executed a Uniform Application for Securities Industry Registration or Transfer, commonly referred to as a "U-4 Form." Pursuant to paragraph 5 of the U-4 Form, he agreed

> to arbitrate any dispute, claim or controversy that may arise between me and my firm...that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register...

Plaintiff was and is a registered broker-dealer with the New York Stock Exchange (NYSE), as well as the National Association of Securities Dealers (NASD) and the American Stock Exchange (ASE).

Rule 347 of the NYSE requires arbitration of

> [a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative...

The NASD and ASE also require arbitration of disputes between registered representatives and members.

A dispute arose between plaintiff and defendant regarding his compensation which plaintiff claims resulted from discriminatory treatment. While he resigned in March 1991, he maintains that he was constructively discharged. On or about April 18, 1991 he served a demand for arbitration on defendant seeking compensation allegedly due. Subsequently, he commenced this action alleging that defendant violated the New York State Human Rights Law (Executive Law § 296 *et seq.*) by unlawfully discriminating against him on the basis of race. Defendant now moves to stay this action and compel arbitration of plaintiff's claim.

The U-4 Form agreement containing the arbitration clause is governed by the Federal Arbitration Act (FAA) (9 USC § *et seq.*) because it is a contract involving commerce (*Flanagan v Prudential-Bache Sec.*, 67 NY2d 500, *cert. denied* 479 US 931; *Singer v Jefferies & Co.*, 78 NY2d 76; *see, Gilmer v Interstate/Johnson Lane Corp.*, ___US___, 111 S Ct 1647, 1651-1652, n 2). The FAA "creates a body of federal substantive law" which governs arbitration agreements covered by its terms (*Cone Memorial Hosp. v Mercury Constr. Corp.*, 460 US 1, 25, n 32). Thus, although plaintiff has asserted a state statutory violation,

the arbitrability of his claim is governed by federal law (see, *Southland Corp. v Keating*, 465 US 1).

If a statutory claim is otherwise covered by an arbitration agreement, it is suitable for arbitration "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue" (*Mitsubishi Motors Corp. v Soler Chrysler-Plymouth*, 473 US 614, 628). Here, the broad arbitration agreement does not specifically exclude statutory claims and therefore encompasses plaintiff's discrimination claim which arises out of his employment (*see, Gilmer v Interstate/Johnson Lane Corp., supra*). The issue then is whether congressional intent indicates that arbitration of such a claim should be precluded. There was, of course, no congressional intent expressed in the New York State Legislature's enactment of the Human Rights Law. Under such circumstances, it is appropriate to examine the congressional intent underlying the enactment of a parallel federal statue, in this case, Title VII of the Civil Rights Act of 1964 (42 USC § 2000e *et seq.*) The burden is on plaintiff to demonstrate that Congress intended to preclude a waiver of judicial remedies for employment discrimination claims based on race (*see, Shearson/American Express v McMahon*, 482 US 220).

In *Alexander v Gardner-Denver Co.* (415 US 36), the Supreme Court of the United States held that the plaintiff, who had previously arbitrated his race discrimination claim pursuant to an arbitration clause in his collective bargaining agreement, was not precluded from commencing a Title VII action in federal court. In reaching its decision, the Court stated that "[t]he purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII..." (*id.*, at 56). It found "arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts" (*id.*, at 58).

In a recent case, however, the Supreme Court explicitly rejected the argument that *Alexander* and its progeny (*Barrentine v*

Arkansas-Best Freight System, 450 US 728; *McDonald v City of West Branch, Michigan*, 466 US 284) preclude arbitration of employment discrimination claims *(Gilmer v Interstate/Johnson Lane Corp., supra*, at 1656). While that case involved an age discrimination claim brought pursuant to the Age Discrimination in Employment Act of 1967 (ADEA) rather that a Title VII claim, the reasoning of the Supreme Court provides no basis for distinguishing between those two statutory claims.

Just as in this case, the arbitration agreement in *Gilmer* was contained in a U-4 Form. The Supreme Court explicitly distinguished such an agreement from the collective bargaining agreement in *Alexander* wherein the parties had not agreed to arbitrate statutory claims. The Court also distinguished the *Alexander* line of cases because they were not decided under the FAA and they involved arbitration proceedings where the employees were represented by their unions. Thus, those cases provided no basis for precluding arbitration of Gilmer's statutory claim (*id.*, at 1657). To the extent that *Alexander* "expressed the view that arbitration was inferior to the judicial process for resolving statutory claims, " the *Gilmer* Court found that such mistrust of arbitration had been undermined by subsequent decisions (*id.*, at 1656, n 5).

After its decision in *Gilmer*, the Court vacated a judgment of the Fifth Circuit Court of Appeals affirming the District Court's refusal to compel arbitration of a Title VII claim and remanded the case for further consideration in light of *Gilmer*. On remand, the Court of Appeals reversed the District Court's decision, finding that *Gilmer* required arbitration of the Title VII claim *(Alford v Dean Witter Reynolds*, 939 F2d 229). The Court of Appeals found the ADEA and Title VII to be similar civil rights statutes and thus, had "little trouble concluding that Title VII claims can be subjected to compulsory arbitration" (*id.*, at 230).

Gilmer and *Alford*, however, did not involve a claim of racial discrimination. Unlike age discrimination or sex-based discrimination, racial discrimination resulting from state action is prohibited by the Constitution of the United States. The question then is whether the waiver of the right to a judicial forum should be permitted to include alleged violations of federal law which implicate basic constitutional rights. Such a result is untenable *(but see, Roe v Kidder Peabody & Co.*, US Dist Ct, SD NY, Apr. 19, 1990, Haight, J., 1990 WL 52200).

Generally, constitutional rights can be waived if such waiver is made knowingly and voluntarily *(see, People v Parker*, 57 NY2d 136, 140). The simple act of accepting employment and agreeing to arbitration does not constitute a waiver of the right to seek redress in a judicial forum for alleged racial discrimination. There is nothing wrong with conditioning employment upon an agreement to arbitrate employment disputes. To interpret such an agreement to constitute acquiescence for that forum to hear racial discrimination claims is immoral. As racial discrimination is never excusable it would be against public policy to contract in advance for a limiting forum to hear such claims.

Accordingly, defendant's motion is denied. This constitutes the order of the court.

Dated: November 22, 1991

/Signature
J.S.C.